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No. .....

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SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF OHIO,

Petitioner,

v.

MICHAEL BURKHOLDER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT OF OHIO

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QUESTION PRESENTED

The petitioner, the State of Ohio, prays that a writ of certiorari issue to review the orders of the Ohio Supreme Court entered in Case No. 83-1959, on July 25, 1984 and the decision of the Court of Appeals for the Second Appellate District of Ohio entered in Case No. CA 8256 on October 19, 1983.

The question presented for review may be stated as follows:

DOES THE EXCLUSIONARY RULE, A JUDICIALLY CREATED REMEDY WHICH PROHIBITS EVIDENCE OBTAINED AS THE RESULT OF AN ILLEGAL SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT FROM BEING USED AT A CRIMINAL TRIAL, APPLY TO PROBATION REVOCATION PROCEEDINGS?

The petitioner submits that this question should be answered in the negative. The Courts of Ohio have disagreed.

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MICHAEL BURKHOLDER,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT OF OHIO

I. OPINIONS BELOW

The opinion of the Court of Appeals holding that the exclusionary rule does apply in probation revocation proceedings is reproduced as Appendix D to this petition. The opinion of the Ohio Supreme Court holding that the Fourth Amendment exclusionary rule prohibits evidence which is derived from an illegal search and seizure from being admitted at a probation revocation proceeding is reproduced as Appendix J to the instant petition.

II. JURISDICTION

The jurisdiction of this Honorable Court is being invoked pursuant to 28 U.S.C. Section 1257 (3). Special and important reasons exist in the instant case for granting a writ of certiorari, to wit: A state court of last resort, the Ohio Supreme Court, has decided an important federal

question in a way which is in conflict with both the decisions of several other state courts of last resort and several federal courts of appeal. Moreover, the state courts of Ohio have decided an important question of federal law which has not been, but needs to be, settled by this Honorable Court so as to establish uniformity in applying federal constitutional principles throughout the various state jurisdictions. The last date of the state court rulings was July 25, 1984.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Fourth Amendment To The United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

IV. STATEMENT OF THE CASE

On December 4, 1980, Respondent was indicted by the Montgomery County Grand Jury on one count of Aggravated Burglary in violation of Ohio Revised Code Section 2911.11. On January 30, 1981, Petitioner (State of Ohio) filed a motion to amend the original indictment, said motion being overruled by the trial court on February 17, 1981. Thereafter, on March 24, 1981, Respondent was reindicted by the Grand Jury on one count of Burglary in violation of Ohio Revised Code Section 2911.12. On July 31, 1981, after entering a guilty plea to the lesser included

offense of Breaking and Entering (Ohio Revised Code Section 2911.13), Respondent was placed on five years probation by the trial court, the sentence of not less than two (2) years nor more than five (5) years imprisonment being suspended by the trial court (Appendix A).

On September 1, 1982, in the presence of Respondent's probation officer, the Centerville, Ohio police executed a search warrant at Respondent's residence and allegedly recovered approximately one hundred eighty-three items of stolen property. As a result of the seizures made pursuant to the warrant, Respondent was indicted by the Montgomery County Grand Jury on seven counts of Receiving Stolen Property in violation of Ohio Revised Code Section 2913.51. On November 10, 1982 however, the trial court sustained Respondent's motion to suppress all of the evidence obtained in the search because the warrant did not recite facts sufficient to establish probable cause. The cause was subsequently "terminated" by the trial court vis-a-vis a nolle prosequi and Petitioner has not appealed.

On December 22, 1982, a notice of revocation of Respondent's probation was filed and a revocation hearing was held on or about December 28, 1982, at which the alleged stolen property recovered from the search of Respondent's residence was introduced to show that Respondent had violated the terms of his probation. The same trial court which had earlier suppressed the evidence at trial, admitted it at the probation revocation hearing. In its written opinion filed on January 25, 1983, the trial court held that the exclusionary rule did not apply to a convicted felon in probation revocation proceedings (Appendix B). Thus, the trial court revoked Respondent's Probation and reinstated the original sentence of imprisonment (Appendix C).

Upon appeal, the Court of Appeals reversed the judgment of the trial court and remanded the cause for further proceedings. In its written Opinion rendered on October 19, 1983, the appellate court opined that so long as the exclusionary rule exists, it must be applied uniformly to all criminal trials and hearings. Thus, the Court of Appeals held that the Fourth Amendment exclusionary rule is applicable to probation revocation proceedings (Appendix D). A motion filed by Petitioner on October 21, 1983, seeking reconsideration of the Court of Appeals decision (Appendix E) was subsequently denied by the appellate court (Appendix F). On October 31, 1983, the Court of Appeals journalized its Final Entry in the case (Appendix G). Thereafter, on November 28, 1983, Petitioner filed a motion to certify the record of the case to the Ohio Supreme Court (Appendix H). The Court of Appeals, finding its judgment to be in conflict with the Court of Appeals for Summit County in *State* v. *Allen* (Dec. 22, 1982) No. C.A. 10814, unreported, and the Court of Appeals for Auglaize County in *State* v. *Bailey* (June 29, 1981), No. 2-80-25, unreported, certified the record of the case to the Ohio Supreme Court for review and final determination on December 22, 1983, (Appendix I).

On July 25, 1984, the Ohio Supreme Court issued its written decision wherein the Court held that the Fourth Amendment exclusionary rule prohibits evidence which is derived from an illegal search and seizure from being admitted against a convicted felon at a probation revocation proceeding (Appendix J). In so ruling the Ohio Supreme Court recognized the important constitutional considerations involved and concluded that the substantive constitutional right against unreasonable searches and seizures embodied in the Fourth Amendment to the United States

Constitution and in the Ohio Constitution as well must apply to probation revocation proceedings. Although the Ohio Supreme Court's ruling is in accord with a few jurisdictions, the vast majority of state jurisdictions and federal circuits that have considered the question have ruled contra.

V. REASONS FOR GRANTING THE WRIT

This case presents the question: does the Fourth Amendment exclusionary rule, having been invoked to suppress evidence in a criminal proceeding, apply to a subsequent probation revocation proceeding where evidence of the probation violation was obtained by police officers acting in reasonable good faith reliance upon a search warrant issued by a detached and neutral magistrate, but ultimately found to be unsupported by probable cause? The Supreme Court of Ohio has answered this question in the affirmative, holding that a probationer has a substantive right to assert the exclusionary rule in a probation revocation proceeding because that constitutional guarantee cannot be limited in any manner whatsoever. *State* v. *Burkholder,* 12 Ohio St. 3d 205 (as yet unpublished), 12 OBR 269 (1984). The State of Ohio (Petitioner) takes exception to this holding and seeks a writ of certiorari to review the decision of the Ohio Supreme Court.

Although this Court has not yet addressed this compelling federal constitutional question (the answer to which must be the same throughout the various State jurisdictions in order to promote uniformity and consistency), a majority of both federal and state courts that have considered the question have refused to impose the exclusionary rule in an inflexible manner to probation revocation

proceedings as did the Supreme Court of Ohio. Rather, in utilizing a balancing test as enunciated by this Court for determining the applicability of the exclusionary rule, these courts have recognized that the benefits to be derived from a rigid application of the rule, (the exclusionary sanction already being operative in the criminal prosecution proper), are outweighed by the concomitant impairment of the remedial and protective purposes of the probation system. Moreover, the courts have shown no reluctance to refuse expansion of the rule particularly where there is no showing of police harassment, inasmuch as the central purpose of the rule, deterrence, will not be served in such instances. *See*: *United States* v. *Bazzano,* 712 F.2d 826 (3rd Cir. 1983), certiorari denied, 104 S.Ct. 1439 (1984); *United States* v. *Frederickson,* 581 F.2d 711 (8th Cir. 1978); *United States* v. *Wiygul,* 578 F.2d 577 (5th Cir. 1978); *United States* v. *Winsett,* 518 F.2d 51 (9th Cir. 1975); *United States* v. *Farmer,* 512 F.2d 160 (6th Cir. 1975); *United States* v. *Vandemark,* 522 F.2d 1019 (4th Cir. 1975); *United States* v. *Brown,* 488 F.2d 94 (5th Cir. 1973); *United States* v. *Johnson,* 455 F.2d 932 (5th Cir. 1972), certiorari denied, 409 U.S. 856 (1972); *United States* v. *Hill,* 447 F.2d 817 (7th Cir. 1971); *United States ex rel. Sperling* v. *Fitzpatrick,* 426 F.2d 1161 (2nd Cir. 1970); *Connelly* v. *Parkinson,* 405 F. Supp. 811 (S.D.S.D. 1975); *United States* v. *Delago;* 397 F. Supp. 708 (S.D.N.Y. 1974); *United States* v. *Rushlow,* 385 F. Supp. 795 (S.D. Cal. 1974), affirmed, 541 F.2d 287 (9th Cir. 1976), certiorari denied, 429 U.S. 984 (1976); *United States* v. *Allen,* 349 F. Supp. 749 (N.D. Cal. 1972); *United States ex rel. Lombardino* v. *Heyd,* 318 F. Supp. 648, affirmed, 438 F.2d 1027 (5th Cir. 1971), certiorari denied, 404 U.S. 880 (1971); *State* v. *Lombardo,* 306 N.C. 594, 295 S.E. 2d 399 (1982); *State*

v. *Alfaro,* 127 Ariz. 578, 623 P.2d 8 (1980); *People* v. *Ressin,* 620 P.2d 717 (Colo. 1980); *State* v. *Davis,* 375 So.2d 69 (La. 1979); *State* v. *Spratt,* 386 A.2d 1094 (R.I. 1978); *State* v. *Sears,* 553 P.2d 907 (Alaska 1976); *State* v. *Caron,* 334 A.2d 495 (Me. 1975); *People* v. *Coleman,* 13 Cal. 3d 867, 533 P.2d 1024 (1975); *State* v. *Thorsness,* 165 Mont. 321, 528 P.2d 692 (1974); *Bernhardt* v. *State,* 228 So.2d 490 (Fla. 1974); *Lemire* v. *Bouchard,* 113 N.H. 174, 304 A.2d 647 (1973); *State* v. *Knowles,* 25 Utah 2d 13, 474 P.2d 727 (1970); *Harris* v. *State,* 606 S.W.2d 93 (Ark. App. 1980); *People* v. *Dowery,* 20 Ill. App. 3d 738, 312 N.E. 2d 682 (1974), affirmed, 62 Ill. 2d 200, 340 N.E. 2d 529 (1975); *Commonwealth* v. *Davis,* 234 Pa. Super 31, 336 A.2d 616 (1975); *State* v. *Kuhn,* 7 Wash. App. 190, 499 P.2d 49 (1972), affirmed, 81 Wash. 2d 648, 503 P.2d 1061.

In reaching a determination of whether the Fourth Amendment exclusionary rule should be applied to a probation revocation proceeding this Court must ". . . weigh the potential injury to the historic rule and functions . . ." of the probation revocation proceeding, ". . . against the potential benefits of the rule as applied in this context." *United States* v. *Calandra,* 414 U.S. 338, 349, 94 S.Ct. 613, 620 (1974).

Those who argue in favor of the rule's applicability note that revocation of probation is often used by prosecutors as an alternative to criminal prosecution of the substantive offense and thus the exclusionary sanction should apply because it is essentially an adjudicative proceeding, therefore unconstitutionally seized evidence should not be used to support a charge which may subject the probationer to imprisonment. Additionally, proponents of the rule's applicability argue that despite their status as probationers

they do not lose their substantive constitutional right to remain free of unreasonable searches and seizures. Judicial countenance of police misconduct, it is argued, only frustrates the rehabilitative purposes of the probation system. *See*: *United States* v. *Workman,* 585 F.2d 1205 (4th Cir. 1978); *State* v. *Shirley,* 117 Ariz. 105, 570 P.2d 1278 (1977); *Ray* v. *State,* 387 So.2d 995 (Fla. App. 1980); *Adams* v. *State,* 153 Ga. App. 41, 264 S.E. 2d 532 (1980); *Michaud* v. *State,* 505 P.2d 1399 (Okla. Crim. App. 1973); *Moore* v. *State,* 562 S.W.2d 484 (Tex. Crim. App. 1978).

Those who argue in favor of the exclusionary rule's applicability to probation revocation proceedings, however, fail to consider this Court's pronouncement that a probation revocation hearing is not to be equated with a criminal prosecution in any sense. *Morrisey* v. *Brewer,* 408 U.S. 471, 92 S.Ct. 2593 (1972). Moreover, the proponents' argument overlooks the primary rationale of the exclusionary rule and erroneously characterizes the rule as a personal constitutional right. *United States* v. *Calandra,* supra.

This Court has clearly recognized a distinction between a criminal prosecution and a probation revocation proceeding in determining the applicability of rights which are of a constitutional nature. *Gagnon* v. *Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756 (1973); *Morrissey* v. *Brewer,* supra. The *Morrissey* Court stated:

> We begin with the proposition that the revocation of parole is not a part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. . . Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions. . .

> We emphasize there is no thought to equate this second stage of a parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.
>
> *Id.* at 489, 2600.

In recognition of this distinction this Honorable Court has stated, "(a)lthough a revocation of probation must comport with the requirements of due process, it is not a criminal proceeding. . . Just as there is no right to a jury trial before probation may be revoked, neither is the privilege against compelled self-incrimination available to a probationer." *Minnesota* v. *Murphy,* —— U.S. ——, 104 S.Ct. 1136, 1147 at n. 7 (1984). Thus, in accordance with the rulings of this Court it is clear that a probationer is not entitled to the same constitutional guarantees due a presumptively innocent person at a criminal trial. The contention that a probationer possesses an unqualified right to all constitutional guarantees in a probation revocation hearing has been rejected by this Court. Such rights are of a limited nature. *Morrissey* v. *Brewer,* supra; *Minnesota* v. *Murphy,* supra.

A person may be placed on probation only after he has been convicted of a criminal offense. The accepted purpose of probation is to grant a defendant a chance for rehabilitation with resort to incarceration. *Gagnon* v. *Scarpelli,* supra; *Morrissey* v. *Brewer,* supra. A trial court who sentences a defendant to probation rather than imprisonment for the offense committed takes a calculated risk that the defendant's rehabilitation will progress and that society will be adequately protected by the defendant's return to the community. The probationer is entrusted

with liberty, in lieu of imprisonment, contigent upon his compliance with the specific terms of his probation. *Morrissey* v. *Brewer,* supra, at 489, 2598. Where a probationer violates a condition of his probation by committing another criminal offense, the safety of the community is threatened and the rehabilitative purpose of probation is not served.

In such a situation the Ohio Legislature has recognized that the trial court has broad discretion in determining whether its confidence in the probationer has been misplaced. Thus, the Ohio Rules of Evidence do not apply to probation revocation proceedings, Ohio Evid. R. 101 (C) (3), and the quantum of evidence required is not beyond a reasonable doubt but rather evidence of a substantial nature to justify revocation. *State* v. *Mingua,* 42 Ohio App. 2d 35, 327 N.E. 2d 791 (Franklin Co. Ct. App. 1974). The purpose of the revocation hearing is not to decide the guilt of innocence of the probationer as that has been previously determined. This Court has noted that given the function and purpose of the probation/parole system, ". . . the State has an overwhelming interest in being able to return the individual to imprisonment . . ." *Morrissey* v. *Brewer,* supra, at 483, 2601. The question presented in the instant case is whether the benefits to be derived from the application of the exclusionary rule to probation revocation proceedings are outweighed by the need to provide the trial court with the discretion to review all relevant and reliable evidence in order to determine if the probationer has violated the terms of his probation. Should the trial judge be permitted to ". . . make a 'true' evaluation of the probationer's actions," *Burkholder,* supra, at 12 OBR 273 (Holmes, dissenting), or rather, should the trial court be required to ignore competent and probative evidence that the probationer has committed yet another crime

while on probation because the exclusionary rule ". . . applies equally to all persons and is not limited in any manner whatsoever." *Id.* at 270 (majority opinion). It is the State's contention that in the absence of an intentional and deliberate Fourth Amendment violation (i.e. "bad faith"), the specific purpose of the exclusionary rule will not be served by its blanket application to probation revocation proceedings.

The Fourth Amendment exclusionary rule as first announced in *Weeks* v. *United States,* 232 U.S. 382, 34 S.Ct. 341 (1914), and made applicable to the states in *Mapp* v. *Ohio,* 367 U.S. 643, 81 S.Ct. 1684 (1961), ". . . is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra,* supra, at 348. Thus, the primary purpose of the exclusionary rule is to deter unlawful police conduct. This Court has also referred to the need to preserve judicial integrity as a second purpose for imposition of the exclusionary rule. *Elkins* v. *United States,* 364 U.S. 206, 80 S.Ct. 1437 (1960). The Supreme Court of Ohio placed substantial reliance upon this latter rationale in order to justify its application of the exclusionary rule in the instant case. *State* v. *Burkholder,* supra, at 12 OBR 271.

However, this Court has emphasized that "(w)hile courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *Stone* v. *Powell,* 428 U.S. 465, 485, 96 S.Ct. 3037, 3048 (1976). Moreover, as the *Calandra* Court emphasized, there is no *per se* rule requiring application of the exclusionary rule to all stages of a criminal proceeding:

> Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.
>
> *Id.* at 348.

Instead of a blanket imposition of the exclusionary rule to all stages of a criminal proceeding as propounded by the Supreme Court of Ohio, this Court has recognized that it must weigh the likely social benefits of excluding unlawfully seized evidence against the substantial social costs exacted by application of the exclusionary rule to the particular proceeding in question. *United States* v. *Calandra,* supra. Consistent with this analytic framework this Court has refused to apply the exclusionary rule in a variety of contexts where the marginal or nonexistent benefits of deterrence are far outweighed by the social costs of imposing the rule. "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *United States* v. *Payner,* 447 U.S. 727, 734, 100 S.Ct. 2439, 2445 (1980).

Thus, this Court has refused to extend the exclusionary rule where it has been determined that the benefits of such an extension would not outweigh its costs. E.g. *United States* v. *Calandra,* supra, (exclusionary rule inapplicable to grand jury proceedings); *Stone* v. *Powell,* supra, (exclusionary rule inapplicable to federal habeas corpus proceedings); *Alderman* v. *United States,* 394 U.S. 165 (1969); (exclusionary sanction not available to individual who lacks standing to contest search); *Walder* v. *United*

States, 347 U.S. 62 (1954); *Harris* v. *New York,* 401 U.S. 222 (1971); (unconstitutionally seized evidence may be used against a defendant to impeach his credibility); *United States* v. *Jans,* 428 U.S. (1976); (exclusionary rule inapplicable to federal civil proceedings); *Brown* v. *Illinois,* 422 U.S. 590 (1975); *United States* v. *Ceccolini,* 435 U.S. 268 (1978); (dissipation of the taint concept where police misconduct is so attenuated that the deterrent effect of the exclusionary rule is not justified by the cost of excluding probative evidence). However, this Court has ". . . continued application of the rule to suppress evidence from the (prosecution's) case where a Fourth Amendment violation has been substantial and deliberate." *Franks* v. *Delaware,* 438 U.S. 154, 171, 98 S.Ct. 2674, 2684 (1978).

The principles which have evolved regarding the application of the Fourth Amendment exclusionary rule have most recently been applied by this Court in *United States* v. *Leon,* — U.S. — (as yet unpublished), 35 Crim. L. Rep. 3273 (1984). The *Leon* Court reiterated the principle that the exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. Whether the defendant's Fourth Amendment rights were violated is a separate question from whether exclusion should be imposed, and "must be resolved by weighing the costs and benefits." *Leon,* supra, at 35 Crim. L. Rep. 3276. In regard to the particular facts of the *Leon* case this Court held, ". . . evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case-in-chief." *Id.* at 3278. This Court noted:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police may have engaged

> in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused. Where the official conduct was pursued in complete good faith, however, the deterrence rationale loses much of its force.
>
> *Id.* at 3279.
> (Citations omitted)

Thus, where an officer acts in objective good faith reliance upon a properly procured search warrant which is subsequently determined to be defective, ". . . there is no police illegality and thus nothing to deter." *Id.* at 3280.

In direct conflict with the pronouncements of this Court in a line of cases culminating in the *Leon* decision, the Supreme Court of Ohio has chosen to apply the exclusionary rule where only a "potential" for police abuse is present because, ". . . this potential for abuse must be deterred in order to maintain the constitutional guarantees that underlie the exclusionary rule." *State* v. *Burkholder,* supra, at 12 OBR 271. The anomaly created by the Supreme Court of Ohio's approach in the *Burkholder* decision is apparent. Under the law as it exists today pursuant to *United States* v. *Leon,* supra, the evidence gathered by the police officers in the case *sub judice* (183 articles of stolen property) which was discovered pursuant to the officers' objective good faith reliance upon a search warrant ultimately found to be unsupported by probable cause, would be admissible in the prosecution's case-in-chief. Yet, under *Burkholder,* supra, that exact same evidence is not admissible in a totally ancillary probation revocation proceeding because of the "potential" for police misconduct. Logic,

common sense and this Court's own recent decisions compel a contrary result.

A majority of Courts that have addressed the question of whether the exclusionary rule should be applied in a probation revocation proceeding have concluded that the cost of exclusion on behalf of an uncertain or nonexistent deterrent effect is far outweighed by the need to provide the trial judge with all information bearing upon the individual's attempt at rehabilitation and the risks to those in the community who are the subject of the probationer's continued criminal activity.

Thus, the Third Circuit Court of Appeals in *United States* v. *Bazzano*, supra, concluded that:

> . . . excluding from such proceedings reliable evidence bearing on a probationer's rehabilitation would contribute little to deterring constitutional violations while impeding society's interest in protecting itself against convicted criminals who have abused the liberty afforded them.
>
> *Id.* at 831.

The Court went on to note that application of the exclusionary rule would significantly interfere with the State's interest in ensuring that conditions of probation are not violated. As a result, the remedial purposes of the probation system would likely be impaired. *Id.* at 834. Moreover, in noting that the primary purpose of the exclusionary rule is to deter unlawful police conduct, the Ninth Circuit Court of Appeals has held that there is no need for a double deterrent effect because ". . . the deterrent purpose of the rule is adequately served by excluding the illegally seized evidence from subsequent new criminal prosecutions." *United States* v. *Vandemark*, supra, at 1022.

Expansion of the Fourth Amendment exclusionary rule beyond its traditional applicability to criminal trials is appropriate only where the remedy invoked furthers the deterrent purpose of the rule. Thus, in *United States* v. *Farmer,* supra, the Court refused to extend the exclusionary rule to probation revocation proceedings in the absence of some showing of police harassment because the supplemental or marginal deterrence was considered insufficient to justify the resulting impairment of the probation system.

It is undisputed that there was probative, reliable evidence before the trial court that the Respondent was in possession of 183 articles of stolen property in violation of one of the conditions of his probation. Moreover, there has been no showing that the investigating police officers did anything other than reasonably rely upon a search warrant issued by a detached and neutral magistrate in obtaining the evidence in question. It defies common sense to suggest that notwithstanding the actions of the police officers in obtaining said search warrant, suppression is nevertheless required in order to deter future illegal conduct on the part of those officers. As this Court recognized in *United States* v. *Leon,* supra, in such cases "there is no police illegality and thus nothing to deter." *Id.* at 3280.

In light of the aforementioned factors which significantly reduce any deterrent value that might result from expansion of the exclusionary rule to probation revocation proceedings, it appears unlikely that this Court would be willing to strike a balance which achieves little other than distorting the function and role of the probation system, as the Ohio Supreme Court has done. The Ohio Supreme Court has decided an important question involving the Fourth Amendment exclusionary rule in a way which conflicts with the decisions of several other state courts of last

resort and several federal circuit courts of appeal. Moreover, although the *Burkholder* decision is not in direct conflict with any opinion of this Court, it is certainly contrary to the principles enunciated by this Court in recent cases dealing with the proper application of the Fourth Amendment exclusionary rule. Thus, the compelling federal question at issue in the instant case needs to be settled by this Court in order to achieve uniformity in applying federal constitutional principles throughout the various state jurisdictions. Wherefore, Petitioner respectfully prays that a Writ of Certiorari issue to review the decision of the Ohio Supreme Court.

Respectfully submitted,

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COUNSEL FOR PETITIONER

APPENDIX A

IN THE COMMON PLEAS COURT
OF MONTGOMERY COUNTY, OHIO
CRIMINAL DIVISION

CASE NO. 80-CR-2307

STATE OF OHIO,

Plaintiff,

v.

MICHAEL E. BURKHOLDER,

Defendant.

TERMINATION ENTRY

(Filed October 29, 1981)

CONVICTED OF: BREAKING & ENTERING.

On October 27, 1981, the defendant herein appeared in open Court with Counsel for sentencing, the Court having received a written report of a pre-sentence investigation submitted by the Adult Probation Department of this Court.

WHEREFORE, it is the JUDGMENT and SENTENCE of the Court that the defendant herein be delivered to Columbus Correctional Facility and there be imprisoned and confined for a term of not less than two (2) years nor more than five (5) years, and further that

she/he pay the costs of this prosecution taxed at $ . . . . . , upon which execution is hereby awarded, through the Adult Probation Department of this Court unless otherwise specified.

Imprisonment is suspended and defendant is placed on probation for a period not to exceed five (5) year (s) under the supervision of the Adult Probation Department of this Court. Defendant shall be subject to the General Rules of this Court for Probationers and such additional specific orders as have been or shall be imposed by this Court or Adult Probation Department of this Court.

Defendant is sentenced and placed on probation under the provisions of § (s) 2911.13 and § 2951.02, O.R.C. Bond is released.

APPROVED: ————————————————

JUDGE JOHN KESSLER

LEE C. FALKE
Prosecuting Attorney of
Montgomery County, Ohio

By————————————————

ROBERT D. HEAD
Assistant Prosecuting Attorney

Defense Counsel: J. Wenzke, 379 W. First St., 45422

APPENDIX B

IN THE COMMON PLEAS COURT
OF MONTGOMERY COUNTY, OHIO

CASE NO. 80-CR-2307

(Judge John W. Kessler)

STATE OF OHIO,

Plaintiff,

v.

MICHAEL BURKHOLDER,

Defendant.

DECISION AND ORDER

This cause came before the Court pursuant to an evidentiary hearing for the Court to determine whether Defendant's probation, granted in October, 1981, should be revoked and the original sentence of two (2) to five (5) years at the Ohio State Penitentiary reinstated. Defendant stands accused by proper notice of violating Rule No. 1, to wit: "I will obey all laws and traffic regulations, this includes, City, County, State and Federal laws."

The substance of this accusation is essentially the allegations in Montgomery County Common Pleas Court Case No. 82-CR-1857, to wit: That Defendant knowingly received and retained stolen property at 11 Edgar Avenue, Dayton, Ohio, on September 9, 1982. In that case, this Court had sustained Defendant's Motion to Suppress Evidence, finding that the search warrant issued lacked cer-

tain constitutional requisites and was, therefore, invalid. (See Decision and Order 82-CR-1857). That case was then subsequently nolle prosequi. This probation revocation action was then instituted wherein the State of Ohio offers as evidence the same evidence previously suppressed by this Court. Defendant has made timely objection to same and memoranda have been submitted by both counsel.

Ohio Revised Code Section 2951.09 provides the power of the Court to hear and determine probation violation matters. The defendant therein is entitled to the minimum requirements of due process of law. *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973); *State* v. *Miller,* 42 O. S. 2d 102 (1975); *State* v. *Smith,* 29 O. App. 2d 241 (1972). However, the Court in making its inquiry is not bound by the usual rules of evidence, and its consideration of evidence tending to show a violation of the terms of a defendant's probation is subject only to the exercise of sound judicial discretion. *State* v. *Theisen,* 167 O.S. 119 (1957); *Ohio Rules of Evidence,* Ev. R. 101 (C) (3). The quantum of evidence required to support a revocation of probation is not proof beyond a reasonable doubt, but only evidence of a substantial nature to justify revocation. *State* v. *Mingua,* 42 O. App. 2d 35 (1974).

The question of whether evidence seized through illegal search and seizure is admissible in state probation revocation proceedings has not been directly addressed in Ohio. This Court has found that ten (10) states as well as most of the federal authorities favor the admissibility of such evidence, while only four (4) states exclude same.

United States v. *Farmer,* 512 F. 2d 160 (6th Cir. 1975), cert. denied 423 U.S. 987 (1975) permitted illegally seized evidence of illegal gambling in a probation revocation

action noting that no evidence of police harassment was present.

Most other federal circuit decisions likewise permit the consideration of illegally seized evidence as long as the police were not engaged in harassment or a willful disregard of the probationer's rights. *U. S.* v. *Nagelberg,* 413 F. 2d 708 (2nd Cir. 1969), cert. denied 396 U. S. 1010 (1970); *U. S.* v. *D'Amato,* 429 U. S. 1284 (3rd Cir. 1970); *U. S.* v. *Brown,* 488 F. 2d 94 (5th Cir. 1973); *U. S.* v. *Hill,* 447 F. 2d 817 (7th Cir. 1971); *U. S.* v. *Vandemark,* 522 F. 2d 1019 (9th Cir. 1975); *Yates* v. *U. S.,* 308 F. 2d 737 (10th Cir. 1962).

Ultimately, the question must rest on a determination of the purpose and extent of the exclusionary rule. One of the best discussions this Court has found on these subjects is *U. S.* v. *Calandra,* 414 U. S. 338 (1974). Therein the Court applied a balancing test to determine the applicability of the exclusionary rule to certain grand jury proceedings. The balance was between the benefits to be secured by the application of the rule as opposed to the detriments to the grand jury system. Further, the court in analyzing the purpose of the exclusionary rule found that the exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendments rights generally through its deterrent effect on future unlawful police conduct, rather than a personal constitutional right of the aggrieved party. Further, despite its broad deterrent purpose, the rule does not proscribe the use of illegally seized evidence in all proceedings or against all persons, and its application has been restricted to those areas where its remedial objectives are thought most efficaciously served.

The dissent in *Calandra, supra,* as well as the Defendant in the instant case argues strenuously for the adoption of

the "judicial integrity" theory of the purpose of the exclusionary rule. The champions of the judicial integrity theory were Justices Holmes and Brandeis, and embodied same primarily in the dissent in *Olmstead* v. *U. S.*, 277 U. S. 438 (1928). Unfortunately, the judicial integrity theory never commanded a majority of the United States Supreme Court and probably was last urged with any concentrated effort in *Calandra, supra*. Basically, the theory is that upon admission of illegally seized evidence in any judicial proceeding, the judiciary becomes tainted by a "partnership" in official lawlessness.

In *Elkins* v. *U. S.*, 364 U.S. 206 (1960), the court stated, "The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it."

In the instant case, the purpose of the exclusionary rule was fulfilled when the Court suppressed for use the evidence in Case No. 82-CR-1857. To further exclude evidence probative and competent to prove the commission of a crime while Defendant was on probation to this Court would in no way further the purposes of the exclusionary rule. Here, the police at least sought the protection of a search warrant prior to any entry into the premises. There is no evidence that the police ever knew Defendant was on probation let alone any intent to harass Defendant or willfully violate any of Defendant's constitutional rights.

As opposed to Defendant's arguments, this Court feels that to exclude and ignore the evidence presented by the State in this probation revocation proceeding would be a breach of "judicial integrity". As stated in *Theisen, supra*, "The alleged probation violator has had his day in court on

a criminal charge and has pleaded guilty thereto or has been adjudged guilty thereof . . . . He is, at all times prior to the termination of his probation, a convicted criminal. He has been allowed to remain in society by virtue of the discretion of a trial judge, a discretion upon the exercise of which, as a matter of right, he can exert no claim or upon the withholding of he can predicate no complaint." The detriment to the probation system in this county to allow Defendant to escape responsibility for his illegal conduct by virtue of a sweeping exclusionary doctrine while on probation would be severe. To exclude the evidence from consideration herein would be to judicially countenance illegal behavior far more than any nebulous judicial association with illegal police conduct. Defendant herein has breached a trust advisedly given by the Court only one year previously. To preserve judicial integrity, the remedy must be swift and sure.

This Court finds by substantial probative and competent evidence that Defendant violated Rule No. 1 of the General Rules of Probation of this court in the manner alleged in the notice thereof and does hereby revoke said probation.

SO ORDERED:

/s/ JOHN W. KESSLER, JUDGE

Copies of this Decision and Order were forwarded to all parties listed below by ordinary mail this filing date.

Lee C. Falke, Montgomery County Prosecutor (Attn: Carley Ingram)

John H. Rion/James P. Rion, 1630 One First National Plaza, Dayton, Ohio 45402, Attorneys for Defendant.

Montgomery County Adult Probation Department

Gregg Findlay, Bailiff

APPENDIX C

3/24/83

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO
CRIMINAL DIVISION

CASE NO. 80-CR-2307
[Filed March 25, 1983]

STATE OF OHIO,

Plaintiff,

v.

MICHAEL E. BURKHOLDER

Defendant.

ENTRY AND ORDER

The defendant herein having violated the conditions of his/her probation granted on October 27, 1981, for the offense(s) of Breaking and Entering was on March 22, 1983, brought before the Court;

WHEREFORE, it is the JUDGMENT and SENTENCE of the Court that the defendant herein be delivered to Columbus Correctional Facility there to be imprisoned and confined for a term of not less than two (2) years nor more than five (5) years,

and further, that he pay the costs of this prosecution taxed at $....., upon which execution is hereby awarded.

Defendant is to receive credit for ..... days spent in confinement.

The Court did fully explain to defendant his/her appellate rights and the defendant informed the Court that he/she understood said rights.

The defendant is sentenced under § 2911.13, O.R.C.

APPROVED: /s/ JOHN W. KESSLER, JUDGE

LEE C. FALKE
Prosecuting Attorney of
Montgomery County, Ohio

By: /s/ JAMES LYON
Assistant Prosecuting Attorney
Defense Counsel: J. Wenzke, 379 W. First, St., 45422
cc: Adult Probation Department

APPENDIX D

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

CASE NO. 8256
(C.P. # 80-CR-2307)

STATE OF OHIO

Plaintiff-Appellee

v.

MICHAEL BURKHOLDER

Defendant-Appellant

OPINION

Rendered on the 19th day of October, 1983

LEE C. FALKE, Prosecuting Attorney for Montgomery, County Ohio,

BY: DAVID M. DALTON, Assistant Prosecuting Attorney, Appellate Division, 7th Floor, County Administration Building, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

JOHN H. RION, Suite 1630, One First National Plaza, Dayton, Ohio 45402
Attorney for Defendant-Appellant

McBRIDE, J. (By Assignment)

The first issue is whether the general rule requiring suppression of evidence obtained illegally applied in a revocation proceeding to a person while on probation. While the first assignment refers only to Article I, Section 14 of the Ohio Constitution, the appellant's argument promptly proceeds into the federal cases and the fundamental federal law upon which such cases are founded.

On July 31, 1981, the appellant pled guilty to breaking and entering and was placed on probation.

On September 1, 1982, a search warrant was issued and executed at appellant's residence. The probation officer appeared on the scene while the search warrant was being executed. A substantial amount of stolen property was recovered, resulting in an indictment for receiving stolen property. This charge was dismissed by the State after the evidence was suppressed.

One reason given for suppression was that the officer executing it did not have the authority to execute it within the City of Dayton. That reason alone is insufficient since a violation of statute does not rise to constitutional proportions and does not involve a constitutional right requiring suppression of evidence. *Kettering* v. *Hollen,* 64 Ohio St. 2d 232 (1980). However, the decision of the trial court also held that the affidavit for the search warrant did not recite facts sufficient for probable cause for its issuance in the first place. Opinion in Case No. 82-Cr-1857, November 10, 1982, page 2. The evidence produced by the search was suppressed. There was no appeal.

The State returned to the original breaking and entering conviction in No. 80-CR-2307 and filed for revocation of probation. It admittedly introduced the same evidence that had been suppressed in No. 82-CR-1857 as a basis for a violation of law by the probationer contrary to the rules

governing probation. The same trial judge admitted such evidence at the hearing on probation and found that the exclusionary rule does not apply to a convicted felon in a revocation of probation proceeding.

Admittedly, the parties and the subject matter were the same in both cases. It would seem that *res judicata* applies to the relitigation of the suppression question for the second time at the revocation hearing. This may be determinative; however, the point was not thoroughly covered as the appellant pressed to raise the constitutional issue.

Since no Ohio case addresses the constitutional question directly, the trial court and counsel rely upon many cases elsewhere in which distinctions, limitations and other reasons are advanced for and against the general application of the constitutional rule requiring the suppression of evidence to ancillary proceedings, such as one directed to the revocation of probation.

It is our opinion that so long as the exclusionary rule exists, it must be applied to all criminal trials and hearings. The right of the people to be secure in their persons and houses against unreasonable searches and seizures is not qualified. The champions of "judicial integrity" and other theories who seek to undermine that constitutional right just a little bit here and there in judicial proceedings without ignoring the suppression rule can do more damage to "judicial integrity" than those who directly oppose the suppression rule.

Where there is a conflict of opinion elsewhere, it is appropriate to explore the rationale of Ohio decisions for whatever guide posts there may be, however obscure. Despite its distinctions, the case of *State* v. *Gallagher* provides one key to the question of the extent of constitutional privileges. The history of the case extends through 38 Ohio

St. 2d 291 (1974); 425 U.S. 257 (1976) and 46 Ohio St. 2d 225 (1976). The Ohio Supreme Court held and reaffirmed that the suppression rule under the Miranda doctrine applied to a convicted felon on parole and it said that a violation rendered the parolee's utterances inadmissible at trial.

Gallagher, supra, involved a violation of the privilege against self-incrimination as extended and buttressed by rules of the Supreme Court's own creation. In the instant case freedom from unreasonable search and seizure rests securely in the language of the constitution unaided by judicial rules.

A parolee is not the same as one on probation; however, the distinction is without a difference. Both are convicted felons serving different forms of punishment. Both are under the control of an officer representing the court or the public. *Gallagher,* we conclude, is authority for the law that neither a parolee nor a person on probation is denied the right to assert a constitutional privilege.

The rationale in *Gallagher* expressly rejected decisions of other states basing rejection upon the unique position of power held by parole officers in Ohio bringing them within the same situation as that of any other law enforcement officer who may exercise power or influence over another in his custody or control. While the factual background differs in the instant case, *Gallagher* establishes at least that one on parole and, as we conclude, one on probation does not lose his right to rely upon constitutional privileges.

Having reached this point, we are faced with the last question and the issue in this case on the first assignment of error. Does such a person lose his constitutional guarantees because they are violated in a probation revocation proceeding and not in a trial on the merits? We think not. Since a parolee or a probationer is entitled to exercise his

constitutional privileges, how can such fundamental rights be denied by any lesser power or authority? Since state statutes may be disregarded in determining illegality under the constitution, must not such state statutes and distinctions in state judicial proceedings be similarly disregarded in determining issues that rise to constitutional proportions?

Nowhere in the constitution is there a limitation upon individual privileges in respect to freedom from unreasonable search and seizure. It does not augur well for the future if the judiciary may pick and choose at which of its proceedings the constitution will be recognized and enforced. A convicted felon is in jeopardy of his liberty in a revocation proceeding. The protection of life, liberty and property is of the essence of constitutional privileges. This right is not lost because the language of nearly all cases relate to trial rather than to a subsequent judicial proceeding for revocation.

It is true that in the instant case we do not have a parole or probation officer testifying as to an inadmissible statement. But we do have another law enforcement officer conducting a search previously determined with finality to be illegal. The difference in responsibility of the public officer or officers is irrelevant.

When it is said that in a revocation hearing the defendant is entitled to the minimum requirements of the due process clause, the reference is to the procedural aspects of the proceedings. This minimum in due process does not and cannot eliminate the personal guarantees expressed elsewhere in either applicable constitution.

In response to the first assignment, we conclude that Article I, Section 14 of the Ohio Constitution applies to revocation proceedings. As long as the existing law supports the suppression of evidence obtained in an unreason-

able search and seizure, such law must be applied in a proceeding for revocation of probation.

We do not agree that the purpose of the exclusionary rule was fulfilled and the constitutional rights were exhausted when the evidence was suppressed at trial. If this argument be sustained, the suppressed evidence could be received again and again at trial under different indictments if such illegal evidence served a state's purpose. To excuse what admittedly was determined to be an illegal search is to deny the constitutional effect as well as the constitutional purpose of the suppression rule.

We are not here concerned with technical questions as to how this issue arose at the revocation proceeding or its method of disposition. No error in this respect was assigned in this case.

The first assignment is sustained.

The second assignment of error raises the question whether there is sufficient evidence in the existing record to support the finding of a probation violation. The trial court found that the defendant did violate R. C. 2913.51 (A), the receiving and concealing statute. The indictment on this issue was the one previously dismissed by the prosecution after the motion to suppress was sustained.

R. C. 2913.51 (A) requires knowledge or reasonable cause to believe that the property was obtained through commission of a theft offense. Knowledge is an element to be determined from all the circumstances. Seldom is there direct evidence of admission of knowledge. The nature and substantial quality of stolen goods recovered under the illegal search warrant was more than sufficient evidence that the defendant had reasonable cause to believe that the property was stolen.

While this assignment is denied, the evidence was based upon testimony mentioned in the first assignment.

In view of our ruling on the first assignment, the judgment of the trial court will be reversed and the case remanded.

KERNS,J., and WEBER, J., concur.

(Judge Robert L. McBride, Retired from the Court of Appeals, Second Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

Copies mailed to:

David M. Dalton
John H. Rion
Judge John W. Kessler

APPENDIX E

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

CASE NO. 8256

[Filed October 21, 1983]

STATE OF OHIO

Plaintiff-Appellee

v.

MICHAEL BURKHOLDER

Defendant-Appellant.

MOTION FOR RECONSIDERATION

MOTION

Appellee respectfully moves this Court to reconsider its decision in the above captioned case for the reasons set forth in the following Memorandum.

Respectfully submitted,

LEE C. FALKE,
Prosecuting Attorney for
Montgomery County, Ohio

By /s/ DAVID M. DALTON
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ATTORNEY FOR STATE OF OHIO
PLAINTIFF-APPELLEE

MEMORANDUM

The narrow issue before this Court, as set forth in the appellant's First Assignment of Error, was whether or not the exclusionary rule applies to the introduction of evidence at a probation revocation hearing?

First of all, the exclusionary rule is a federally judicially created remedy. It is not a personal constitutional right of the agrieved party. *Weeks* v. *United States,* 232 U.S. 383, 34 S. Ct. 341 (1914); *See also, Linkletter* v. *Walker,* 381 U.S. 618, 85 S. Ct. 1731 (1965); *Elkins* v. *United States,* 364 U.S. 206, 80 S. Ct. 1437 (1960).

Therefore, it would appear that the Sixth Circuit Court of Appeals ruling on this issue, as cited in appellee's brief,

would be controlling law on this issue. In *U.S.* v. *Farmer,* 512 F. 2d 160 (6th Cir. 1975) (appendix A, attached) the court of appeals held the exclusionary rule inapplicable to probation revocation proceedings, absent a clear showing of police harassment.

Based upon the foregoing authority, the appellee did not cite this court to its own unreported cases, which have consistently held in accordance with *Farmer,* supra. In *State* v. *Glenn,* No. 6998 (1981) (appendix B, attached), Judge McBride writing for a unanimous court, including Judges Kerns and Wilson, stated as follows:

> Further this court determined in *State* v. *Shoop, Jr.,* Case No. 80 CA 5, Miami County, October 24, 1980, that the exclusionary rule did not apply in a proceeding to revoke probation.

In *Shoop,* supra, (Appendix C, attached) Judges Kerns and Phillips, with Judge McBride dissenting, stated that, "The sole issue in this appeal is whether the exclusionary rule applies to state revocation proceedings. . .". The identical issue in the case *sub judice.* This Court accordingly held as follows:

> In the present case, there is no evidence of conduct which shocks the conscience or otherwise indicates any type of police harassment, and a rigid application of the exclusionary rule to probation proceedings undoubtedly would have a disruptive influence upon the rehabilitative purposes of the probation system. Needless to say, the Fourth Amendment exclusionary rule is not a personal constitutional right but rather a judicially created remedy which has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. U.S. v. Calendra, 414 U.S. 338; U.S. v. Winsett, 518 F. 2d 51.
>
> Upon the facts of this case, we held that the Fourth Amendment exclusionary rule has no application. . . .

Therefore, the decision in the case *sub judice* not only flies in the face of precedent set forth by the Sixth Circuit Court of Appeals, the overwhelming authority of all other courts which have considered this issue, but it also constitutes a reversal of this Court's previous decisions, without either distinguishing or even addressing them.

In light of the foregoing, the appellee respectfully moves this Court to reconsider its Opinion and Decision in *State* v. *Burkholder,* appendix D attached.

See also, U.S. v. *Bazzans,* 33 Crim. L. Rptr. 2334 (3d Cir. June 17, 1983)

Respectfully submitted,

LEE C. FALKE,
Prosecuting Attorney for
Montgomery County, Ohio
By /s/ DAVID M. DALTON
Assistant Prosecuting Attorney
APPELLATE DIVISION

ATTORNEY FOR STATE OF OHIO
PLAINTIFF-APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion For Reconsideration, was sent via ordinary mail, on the date of filing, to Opposing Counsel: John H. Rion, Suite 1630 One First National Plaza, Dayton, Ohio 45402.

/s/ DAVID M. DALTON

APPENDIX F

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

CASE NO CA 8256

STATE OF OHIO
Plaintiff-Appellee

v.

MICHAEL BURKHOLDER
Defendant-Appellant

DECISION AND ENTRY

Rendered on the 22nd day of November, 1983

LEE C. FALKE, Prosecuting Attorney, Montgomery County, by DAVID M. DALTON, Assistant Prosecuting Attorney, Appellate Division, 7th Floor, Montgomery County Administration Building, Dayton, Ohio 45422
Attorneys for Plaintiff-Appellee

JOHN H. RION, 1630 First National Bank Building, Dayton, Ohio 45402
Attorney for Defendant-Appellant

PER CURIAM:

Upon consideration of the motion of the appellee and appellant's response, the request for reconsideration is denied.

The issue on this appeal was narrower than outlined in the memorandum on behalf of reconsideration. The issue was not simply whether the exclusionary rule applies to the introduction of evidence at a probation revocation hearing. More accurately stated, the issue was whether evidence, judicially determined to be illegal and in violation of the constitutional provision against unreasonable searches, may be later introduced and used in a revocation proceeding for an earlier conviction. In the receiving and concealing case, the trial court found that the search was unconstitutional. When the evidence was suppressed, the prosecution dismissed the charge. The prosecution then initiated revocation proceedings in an earlier case and offered as evidence such facts and circumstances as were previously held to be unconstitutional. It was undisputed that the parties, the facts and the circumstances were the same. The argument by the appellee is that what was determined with finality to be unconstitutional on the merits is not unconstitutional in the revocation proceedings because the appellant was a convicted felon.

The anomaly is that this court is asked to review the same facts and circumstances involving the same identical parties and urged to come to a contrary judgment on the same issue, solely because the appellant was a convicted felon on probation. We agree that in revocation proceedings the process is flexible and the rules of evidence are not necessarily applicable; however, the same flexibility and disregard for state rules of evidence may not be applied to constitutional issues. We find no merit in the argument that equates the rules of evidence with the sanctity of the constitution.

As was pointed out in the opinion, the parties and the subject matter in the evidence were the same in both instances. Facially, *res judicata* applies to relitigation of

the constitutional issue. The memorandum of the appellee does not respond to this determinative question.

The instant case has no similarity with those in which there was other proper evidence upon which the trial court could rely for terminating probation. The issue is not one of discretion of the trial judge. We are faced with a direct constitutional prohibition against unreasonable searches and a judgment of the trial court, never appealed, that the search in this instance was unconstitutional and that the evidence could not be introduced under the indictment. If the prohibition against unreasonable searches was of statutory origin, there would be arguable merit to the arguments of the appellee; however, since the right is one imbedded in the constitution and is a right guaranteed without reservation, it is not reasonable or possible for this court to create an exception to the constitution or to disregard the prior determination between the parties that the instant search was unreasonable, unlawful and could not be used as evidence.

While this case may be distinguished by reason of the attempted circumvention of the initial and final ruling between the parties that the search was unconstitutional, the application of the constitution to those on probaion remains a significant question that may only be resolved with finality by the Supreme Court. In the absence of a definitive answer on this issue, we rely on *State* v. *Gallagher,* 38 Ohio St. 2d 291; 46 Ohio St. 2d 225, to the effect that a person may not be denied his constitutional rights because of his status as a convicted felon.

The motion is denied.

/s/ JOSEPH D. KERNS, Judge
/s/ HERMAN J. WEBER, Judge
/s/ ROBERT L. McBRIDE, Judge
(By Assignment)

APPENDIX G

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

CASE NO. 8256

STATE OF OHIO

Plaintiff-Appellee

v.

MICHAEL BURKHOLDER

Defendant-Appellant

FINAL ENTRY

Pursuant to the opinion rendered by this Court on the 19th day of October, 1983, the judgment of the trial court is reversed. The case is remanded for further proceedings.

/s/ JOSEPH D. KERNS, Judge
/s/ HERMAN J. WEBER, Judge
/s/ ROBERT L. McBRIDE, Judge
(By Assignment)

APPENDIX H

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

CASE NO. 8256

STATE OF OHIO

Plaintiff-Appellee

v.

MICHAEL BURKHOLDER

Defendant-Appellant

APPELLEE'S MOTION TO CERTIFY RECORD TO THE OHIO SUPREME COURT

[Filed November 28, 1983]

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MICHAEL BURKHOLDER
DEFENDANT-APPELLANT

APPELLEE'S MOTION TO CERTIFY RECORD TO THE OHIO SUPREME COURT

Plaintiff-Appellee, by and through counsel and pursuant to R.C. 2505.072, hereby moves this Honorable Court to issue an ORDER to certify the record in the above-captioned case to the Supreme Court of Ohio for the reason that the judgment of this Honorable Court in this case is in conflict with judgments pronounced upon the same question by two other Courts of Appeal in Ohio.

The two cases in conflict with the instant case are *State* v. *Allen,* unreported, Summit County Court of Appeals Case No. 10814 (Ninth Appellate District of Ohio, December 22, 1982); and *State* v. *Bailey,* unreported, Auglaize County Court of Appeals Case No. 2-80-25 (Third Appellate District of Ohio, April 24, 1981). The three cases are in conflict with respect to whether or not the exclusionary rule applies to probation revocation proceedings.

Respectfully submitted,

LEE C. FALKE,
Prosecuting Attorney for
Montgomery County, Ohio

By /s/ SHARON L. OVINGTON
Assistant Prosecuting Attorney
APPELLATE DIVISION
ATTORNEY FOR
STATE OF OHIO
PLAINTIFF-APPELLEE

MEMORANDUM

On October 19, 1983, this Honorable Court reversed Defendant's probation revocation presumably because the exclusionary rule is applicable to probation revocation proceedings and that therefore the doctrine of *res judicata* bars the relitigation of the constitutional issues raised in Defendant's Motion to Suppress. Such a holding appears to be in direct conflict with the holding of the Summit County Court of Appeals in the case of *State* v. *Allen,* unreported, Summit Co. Ct. App. Case No. 10814 (Ninth Appellate District, December 22, 1982), wherein that court held the exclusionary rule to be inapplicable to probation revocation proceedings. Moreover, the holding of this Honorable Court also appears to be in conflict with the holding in *State* v. *Bailey,* unreported, Auglaize Co. Ct. App. Case No. 2-80-25 (Third Appellate District, April 24, 1981).

As this Court stated in its decision on Appellee's motion to reconsider filed November 22, 1983, ". . . the application of the constitution to those on probation remains a significant question that may only be resolved with finality by the Supreme Court." At p. 3. Thus, in order to clarify the law in this area throughout Ohio and in order to lend some stability and provide some guidance to all appellate districts throughout the State, Plaintiff-Appellee (State of Ohio) prays that this Honorable Court certify the record

in the above-captioned case to the Ohio Supreme Court due to the existing conflict.

Respectfully submitted,

LEE C. FALKE,
Prosecuting Attorney for
Montgomery County, Ohio

By /s/ SHARON L. OVINGTON
Assistant Prosecuting Attorney
APPELLATE DIVISION

ATTORNEY FOR
STATE OF OHIO
PLAINTIFF-APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee's Motion To Certify Record To The Ohio Supreme Court, was sent via ordinary mail, on the date of filing to Opposing Counsel: John H. Rion, Suite 1630 One First National Plaza, Post Office Box 1262, Dayton, Ohio 45402.

/s/ SHARON L. OVINGTON

APPENDIX I

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

CASE NO. 8256

STATE OF OHIO

Plaintiff-Appellee

v.

MICHAEL BURKHOLDER

Defendant-Appellant

DECISION AND ENTRY

Rendered on the 22nd day of December, 1983

[Filed December 22, 1983]

LEE C. FALKE, Prosecuting Attorney for Montgomery County, Ohio, By: SHARON L. OVINGTON, (Assistant Prosecuting Attorney, 7th Floor, Montgomery County Administration Building, Post Office Box 972, 451 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

JOHN H. RION of RION, RION & RION CO., L.P.A., Suite 1630 One First National Plaza, Post Office Box 1262, Dayton, Ohio 45402.
Attorney for Defendant-Appellant

PER CURIAM:

The judgment of the court in this case is in conflict with the judgments in *State* v. *Allen* of the Summit County Court of Appeals, No. 10814, unreported (1982) and in *State* v. *Bailey* of the Auglaize County Court of Appeals, No. 2-80-25, unreported (1981).

Each of the two other cases concluded, in one form or the other, that the exclusionary rule does not apply in probation revocation hearings.

We therefore certify the record of this case to the Supreme Court of Ohio for review and final determination pursuant to Rule III, Section 1 of the Rules of Practice of the Supreme Court.

/s/ JOSEPH D. KERNS, Judge
/s/ HERMAN J. WEBER, Judge
/s/ ROBERT L. McBRIDE, Judge
(By Assignment)

APPENDIX J

12 Ohio St. 3d 205.

THE STATE OF OHIO, APPELLANT, *v.*
BURKHOLDER, APPELLEE.

Criminal Law — probation: evidence obtained through unreasonable or unlawful search and seizure is inadmissible in probation revocation proceeding, Sec. 14, Art. I, Ohio Const.

Pursuant to Section 14, Article I of the Ohio Constitution, evidence obtained through an unreasonable or unlawful search and seizure is inadmissible in a probation revocation proceeding.

(No. 83-1959 — Decided July 25, 1984.)

CERTIFIED by the Court of Appeals for Montgomery County.

On July 31, 1981, appellee, Michael Burkholder, was placed on five years' probation by the Court of Common Pleas of Montgomery County, after entering a plea of guilty to breaking and entering (R. C. 2911.13). The sentence of not less than two years nor more than five years in the Ohio penal system was suspended.

On September 1, 1982, in the presence of appellee's probation officer, the Centerville police executed a search warrant at appellee's residence and allegedly recovered approximately one hundred eighty-three items of stolen property. As a result of the seizures made pursuant to the warrant, appellee was indicted by the Montgomery County Grand Jury on seven counts of receiving stolen property (R. C. 2913.51). On November 10, 1982, the trial court

sustained appellee's motion to suppress all the evidence obtained in the search because the warrant did not recite facts sufficient to establish probable cause. The cause was subsequently "terminated" by the trial court entering a *nolle prosequi,* and has not been appealed.

On December 22, 1982, a notice of revocation of appellee's probation was filed and a revocation hearing was held on or about December 28, 1982, at which the alleged stolen property recovered from the search of appellee's residence was introduced to show that appellee had violated the terms of his probation. The same trial court which suppressed the evidence at trial, admitted it at the probation revocation hearing. The trial court held that the exclusionary rule did not apply to a convicted felon in probation revocation proceedings, and reinstated the original sentence of imprisonment.

Upon appeal, the court of appeals reversed the judgment of the trial court and remanded the cause for further proceedings. The appellate court opined that so long as the exclusionary rule exists, it must be applied uniformly to all criminal trials and hearings. The court of appeals cited *State* v. *Gallagher* (1974), 38 Ohio St. 2d 291 [67 O.O. 2d 354], on remand (1976), 46 Ohio St. 2d 225 [75 O.O. 2d 280], where this court held that utterances made by an accused to his parole officer are inadmissible at trial where such utterances were made in response to questioning by the parole officer without the accused being advised of his *Miranda* rights. Despite its distinctions from [206] the instant case, the court of appeals observed that *Gallagher* provides the key to the question of the extent of constitutional privileges.

The court of appeals, finding its judgment to be in conflict with the Court of Appeals for Summit County in

State v. *Allen* (Dec. 22, 1983), No. C. A. 10814, unreported, and the Court of Appeals for Auglaize County in *State* v. *Bailey* (June 29, 1981), No. 2-80-25, unreported, certified the record of the case to this court for review and final determination.

Mr. Lee C. Falke, prosecuting attorney, and *Ms. Sharon L. Ovington,* for appellant.

Mr. Kurt R. Portmann, Mr. Ellis Jacobs and *Mr. David P. Williamson,* for appellee.

SWEENEY, J. The critical issue posed by this appeal is one of first impression before this court, and involves important constitutional considerations. We must decide whether evidence obtained in an unreasonable or unlawful search and seizure, while inadmissible in a trial, is nevertheless admissible in a subsequent probation revocation proceeding. Stated differently, we must determine whether the exclusionary rule is applicable in a probation revocation proceeding.

The appellant contends, *inter alia,* that the exclusionary rule should not apply to probation revocation proceedings, because the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect on unlawful police activities rather than a personal constitutional right of the accused person. The state further submits that Evid. R. 101 (C) (3) provides that courts are not bound by the Rules of Evidence in a probation revocation hearing, and that similarly, the exclusionary rule should not be included as one of the minimum requirements a probationer is entitled to in a probation revocation proceeding.

We disagree, and hold that pursuant to Section 14, Article I of the Ohio Constitution, evidence obtained

through an unreasonable or unlawful search and seizure is inadmissible in a probation revocation proceeding.

Section 14, Article I of the Ohio Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

The constitutional guarantee of this provision applies equally to all persons and is not limited in any manner whatsoever. While the procedural due process requirements in a probation revocation proceeding are not as extensive as those found in a criminal trial, the substantive constitutional right against unreasonable searches and seizures embodied in the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution, must also apply to a probation revocation proceeding.

It has been often stated that the primary purpose of the exclusionary rule is to deter future unlawful police conduct in order to effectuate the Fourth [207] Amendment guarantee against unreasonable searches and seizures. *Elkins* v. *United States* (1960), 364 U. S. 206, 217; *Mapp* v. *Ohio* (1961), 367 U.S. 643, 656 [16 O.O. 2d 384]; *Tehan* v. *Shott* (1966), 382 U.S. 406, 416 [35 O.O.2d 391]; *Terry* v. *Ohio* (1968), 392 U.S. 1, 29 [44 O.O. 2d 383]; *United States* v. *Calandra* (1974), 414 U.S. 338, 347 [66 O.O. 2d 320]; *State* v. *Williams* (1983), 6 Ohio St. 3d 281, 284.

In *Elkins, supra,* at 217, the court stated that the purpose of the exclusionary rule "* * * is to deter — to compel

respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." We believe that the application of the exclusionary rule to probation revocation proceedings furthers the universally accepted purpose to deter police misconduct by removing the incentive to disregard it.

To say, as does the state, that the purpose of the exclusionary rule was fulfilled when the illegally confiscated evidence was suppressed at trial and that this purpose is not furthered by applying the rule to probation revocation proceedings is in our view myopic. While a probationer stands as a convicted criminal and is deserving of close scrutiny, the mechanisms necessary to keep the probationer in check are already in place without the need to resort to cutting back the constitutional guarantees that the exclusionary rule is designed to protect. As the appellee submits, investigations of probation violations and new criminal charges very often involve the police and probation officers working together. Police officers know the possible results of a probation revocation, and that a revocation can have more serious consequences than new charges. The police have ready access to criminal records, and they know of the high probability that any suspect in a new crime may also be a probationer or parolee.

While we encourage the zealous enforcement of the law by our police officers, we must acknowledge that the potential for abuse is present, and that this potential for abuse must be deterred in order to maintain the constitutional guarantees that underlie the exclusionary rule. As the court of appeals below so aptly noted: "To excuse what admittedly was determined to be an illegal search is to deny the constitutional effect as well as the constitutional purpose of the suppression rule."

Our holding in the case *sub judice* is consistent with our decision in *State* v. *Gallagher* (1976), 46 Ohio St. 2d 225 [75 O.O. 2d 280], in that a probationer, like the parolee in *Gallagher,* must be afforded the right to assert his or her constitutional privileges. Furthermore, our decision here is in accord with the cogent analysis of other courts that have already adopted this interpretation. *State* v. *McMilliam* (1956), 243 N. C. 775, 92 S. E. 2d 205; *Cooper* v. *State* (1968), 118 Ga. App. 57, 162 S. E. 2d 753; *Amiss* v. *State* (1975), 135 Ga. App. 784, 219 S. E. 2d 28; *Giles* v. *State* (1979), 149 Ga. App. 263, 254 S. E. 2d 154; *Adams* v. *State* (1980), 153 Ga. App. 41, 264 S. E. 2d 532; *Michaud* v. *State* (Okla. Crim. App. 1973), 505 P. 2d 1399; *Rushing* v. *State* (Tex. Crim. App. 1973), 500 S. W. 2d 667; *Moore* v. *State* (Tex. Crim. App. 1978), 562 S. W. 2d 484; *State* v. *Shirley* (1977), 117 Ariz. 105, 570 P. 2d 1278; *Ray* v. *State* (Fla. App. 1980), 387 So. 2d 995; see, also, Annotation (1977), 77 A.L.R. 3d 636.

[208] As Justice Brandeis noted in his dissenting opinion in *Olmstead* v. *United States* (1928), 277 U.S. 438, at 485:

"* * * In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. * * *"

Based on all the foregoing, we affirm the judgment of the court of appeals in reversing and remanding the judgment of the trial court.

Judgment affirmed.

CELEBREZZE, C. J., W. BROWN, C. BROWN and J. P. CELEBREZZE, JJ., concur.

LOCHER and HOLMES, JJ., dissent.

HOLMES J., dissenting. While the defendant is entitled to certain procedural due process rights at a probation revocation hearing, in my view he is not entitled to the benefits of the exclusionary rule. Therefore, I dissent.

The revocation of probation is not recognized as a part of a criminal prosecution. Thus, the alleged violator is not entitled to all of the constitutional guarantees available to one who stands charged with a criminal offense. *Gagnon* v. *Scarpelli* (1973), 411 U.S. 778 [71 O.O.2d 279]; *Morrissey* v. *Brewer* (1972), 408 U.S. 471. Based on this premise, the vast majority of reported cases have held the Fourth Amendment exclusionary rule inapplicable to probation revocation proceedings. See *Sperling* v. *Fitzpatrick* (C. A. 2, 1970), 426 F. 2d 1161 (parole revocation); *United States* v. *Johnson* (C.A. 5, 1972), 455 F. 2d 932, certiorari denied (1972), 409 U. S. 856; *United States* v. *Wiygul* (C. A. 5, 1978), 578 F. 2d 577; *United States* v. *Brown* (C. A. 5, 1973), 488 F. 2d 94 (alternative holding); *United States* v. *Farmer* (C. A. 6, 1975), 512 F. 2d 160, certiorari denied (1975), 423 U. S. 987; *United States* v. *Hill* (C. A. 7, 1971), 447 F. 2d 817; *United States* v. *Frederickson* (C. A. 8, 1978), 581 F. 2d 711; *United States* v. *Vandemark* (C. A. 9, 1975), 522 F. 2d 1019; *United States* v. *Winsett* (C. A. 9, 1975), 518 F. 2d 51; *Connelly* v. *Parkinson* (S.D.S.D. 1975), 405 F. Supp. 811 (alternative holding); *United States* v. *Delago* (S.D.N.Y. 1974), 397 F. Supp. 708; *United States* v. *Rushlow* (S.D. Cal. 1974), 385 F. Supp. 795, affirmed (C. A. 9, 1976), 541 F. 2d 287, certiorari denied (1976), 429 U. S. 984; *United States* v. *Allen* (N.D. Cal. 1972), 349 F. Supp. 749; *United States,*

ex rel. Lombardino, v. *Heyd* (E. D. La. 1970), 318 F. Supp. 648, affirmed (C.A. 5, 1971), 438 F. 2d 1027, certiorari denied (1971), 404 U. S. 880; *State* v. *Sears* (Alaska 1976), 553 P. 2d 907; *State* v. *Alfaro* (1980), 127 Ariz. 578, 623 P. 2d 8; *Harris* v. *State* (Ark. App. 1980), 606 S. W. 2d 93; *People* v. *Coleman* (1975), 13 Cal. 3d 867, 533 P. 2d 1024; [209] *People* v. *Ressin* (Colo. 1980), 620 P. 2d 717; *People* v. *Wilkerson* (Colo. 1975), 541 P. 2d 896; *People* v. *Atencio* (1974), 186 Colo. 76, 525 P. 2d 461; *Bernhardt* v. *State* (Fla. 1974), 288 So. 2d 490; *Brill* v. *State* (1947), 159 Fla. 682, 32 So. 2d 607; *People* v. *Dowery* (1974), 20 Ill. App. 3d 738, 312 N. E. 2d 682, affirmed (1975), 62 Ill. 2d 200, 340 N. E. 2d 529; *People* v. *Swanks* (1975), 34 Ill. App. 3d 794, 339 N.E. 2d 469; *Dulin* v. *State* (Ind. App. 1976), 346 N. E. 2d 746; *State* v. *Davis* (La. 1979), 375 So. 2d 69; *State* v. *Caron* (Me. 1975), 334 A. 2d 495; *State* v. *Thorsness* (1974), 165 Mont. 321, 528 P. 2d 692; *State* v. *White* (1965), 264 N. C. 600, 142 S. E. 2d 153; *Lemire* v. *Bouchard* (1973), 113 N. H. 174, 304 A. 2d 647; *State* v. *Ray* (Ore. App. 1979), 598 P. 2d 1293; *Commonwealth* v. *Davis* (1975), 234 Pa. Super. 31, 336 A. 2d 616; *State* v. *Spratt* (R. I. 1978), 386 A. 2d 1094; *State* v. *Knowles* (1970), 25 Utah 2d 13, 474 P. 2d 727; *State* v. *Kuhn* (1972), 7 Wash. App. 190, 499 P. 2d 49, affirmed (1972), 81 Wash. 2d 648, 503 P. 2d 1061.

The majority herein fails to recognize the nature of a probation revocation hearing. The important question is whether the probationer is satisfactorily pursuing his rehabilitation and, if not, what appropriate action should be taken by a judicial officer. The revocation process should be flexible to allow a court to consider evidence that would not be admissible in an adversary criminal proceeding. This is the exact reason why the court is not bound by the Rules of Evidence in a probation revocation proceeding. In

other words, the trial judge should be given discretion to review all of the evidence in order to determine if the individual violated the terms of his probation. This standard, which is utilized by most jurisdictions, acts to better serve the judiciary and society as the trial judge can make a "true" evaluation of the probationer's actions.

I agree with the majority that the exclusionary rule was invoked primarily to deter police from making unreasonable searches and seizures. However, assuming that the exclusionary rule has a deterrent effect on the proscribed police conduct, I believe sufficient deterrence flows when the evidence is made unavailable to the prosecution in its case in chief. This is never more apparent than in the present case. As a result of the search of appellee's home, one hundred and eighty-three pieces of stolen property were recovered. This property came from at least seven different burglaries. Appellee was subsequently indicted on seven counts of receiving stolen property. However, the trial court dismissed the case on the basis of an improper search warrant. I fail to see where any additional deterrent effect will be gained by invoking the exclusionary rule to a proceeding after a dismissal of all criminal charges.

Finally, I note that appellee was afforded all of the due process guarantees as required by *Gagnon, supra,* and *Morrissey, supra.* Therefore, the trial judge acted lawfully in revoking appellee's probation. Accordingly, I would reverse the judgment of the court of appeals which rules that the trial court committed error in this matter.

LOCHER, J., concurs in the foregoing dissenting opinion.